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**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
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1919 M Street, N.W.  
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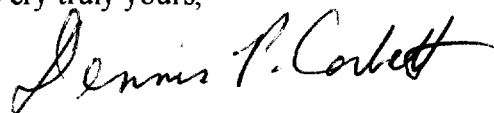
Re: CI Docket No. 95-6

Dear Mr. Caton:

On behalf of CBS Radio, I am transmitting herewith an original and eleven copies of its Petition for Reconsideration in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

The Commission's Forfeiture Policy  
Statement and Amendment of Section  
1.80 of the Rules to Incorporate  
the Forfeiture Guidelines

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CI Docket No. 95-6

To: The Commission

## PETITION FOR RECONSIDERATION

CBS RADIO

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## **SUMMARY**

The Commission's conclusion in the Report and Order that it may use the underlying facts of prior unadjudicated violations as a basis for assessing upward adjustments for "repeated or continuous" violations is inconsistent with the plain language of Section 504(c) of the Communications Act of 1934, as amended, which expressly prohibits the Commission from using unadjudicated forfeiture decisions to the prejudice of the licensee in any subsequent proceeding. The Commission's intention to use the facts underlying such unadjudicated violations clearly undermines the significant due process protections afforded by that statutory provision.

The Commission's attempt to justify its interpretation of Section 504(c) by reference to an isolated excerpt from its legislative history is unavailing. That legislative history, read as a whole, makes clear that neither prior unadjudicated violations nor the conduct underlying them may be considered in determining upward adjustments for "repeated or continuous" violations.

As a practical matter, the prejudicial impact of Commission reliance on the facts underlying a prior, unadjudicated NAL is no different from reliance on the NAL itself -- in either case the licensee will likely be assessed a forfeiture that is much higher than the base forfeiture amount. Moreover, the Commission has failed to consider the substantial adverse consequences for a broadcaster and its reputation that are likely to result from the Commission's presumptive treatment of that broadcaster as a repeat offender.

Several factors also serve to exacerbate the prejudicial effect of the Commission's interpretation of Section 504(c). First, significant delays in the administration of the forfeiture scheme at both the Commission and the Department of Justice effectively preclude prompt judicial review of those decisions. Second, recent Supreme Court precedent has cast doubt on the

constitutionality of the Commission's generic indecency standard and broadcasters are afforded virtually no guidance as to what material may, in fact, be deemed indecent. Finally, the failure to implement the procedural protections of Section 504(c) is compounded by individual Commissioners' apparent prejudgement of the merits of challenges to Commission indecency decisions and threats of administrative repercussions in subsequent proceedings.

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Commission's Forfeiture Policy	)	
Statement and Amendment of Section	)	CI Docket No. 95-6
1.80 of the Rules to Incorporate	)	
the Forfeiture Guidelines	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

CBS Radio,<sup>1/</sup> by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby seeks reconsideration of the Commission's Report and Order in the above-captioned proceeding, FCC 97-218 (released July 28, 1997) ("Report and Order").<sup>2/</sup> In support whereof, the following is shown.

As noted in comments submitted by Infinity Broadcasting Corporation in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding,<sup>3/</sup> the

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<sup>1/</sup> CBS Radio is a division of Westinghouse Electric Corporation ("WEC") and consists of all of the radio stations which are licensed either directly, or through subsidiaries, to WEC.

<sup>2/</sup> A summary of the Report and Order was published in the Federal Register on August 14, 1997. Therefore, this Petition is timely filed pursuant to Section 1.106(f) of the Commission's Rules (47 C.F.R. § 1.106(f)).

<sup>3/</sup> See Comments of Infinity Broadcasting Corporation ("Infinity") (March 27, 1995) ("Infinity Comments"). Infinity is now a component of CBS Radio.

forfeiture guidelines can reasonably be expected to result in analogous treatment of similarly situated offenders and provide clearer guidance to the public regarding proposed forfeitures. Nonetheless, CBS Radio here requests reconsideration on the narrow issue of the Commission's interpretation of its authority under Section 504(c) of the Communications Act of 1934, as amended (the "Communications Act"). Specifically, CBS Radio believes that the Commission has exceeded its statutory authority under that section by concluding that it may use the underlying facts of prior unadjudicated violations as a basis for assessing upward adjustments for "repeated or continuous" violations, and asks the Commission to revise that portion of the Report and Order.

**I.           The Plain Language And Legislative History Of Section 504(c) Preclude The Use Of Prior Unadjudicated Violations Or The Conduct Underlying Such Unadjudicated Violations In Any Subsequent Proceedings.**

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Section 504(c) is a due process codification that, on its face, prohibits the Commission from using unadjudicated forfeiture decisions to the "prejudice" of a licensee "in any other proceeding." (Emphasis added). Specifically, that Section provides that:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

47 U.S.C. § 504(c) (emphasis added).

Accordingly, the Commission may not consider, for any collateral, detrimental purpose whatsoever, the existence of an unpaid, non-final forfeiture.<sup>4/</sup> Indeed, under the plain reading of the statute, the Commission must treat any such prior unadjudicated violation as legally invisible outside that particular forfeiture's context. Although the Commission pays lip service to this statutory restriction in the Report and Order ("the Commission does not use the mere issuance or failure to pay an NAL to the prejudice of the subject[.]" Report and Order at ¶ 34), it nevertheless proceeds to eviscerate the due process protections afforded by Section 504(c) by permitting upward adjustments for subsequent forfeitures on the basis of the facts underlying these prior, unadjudicated decisions. The Commission simply states, without any substantive analysis, that this interpretation "does not cause the prejudice that Congress sought to avoid in Section 504(c)." Id.

This assertion is unsupportable. First and foremost, the Commission has failed to demonstrate and, in CBS Radio's view, cannot demonstrate, how the use of the facts underlying a prior alleged violation is in any substantive way less prejudicial than relying on an unadjudicated, non-final NAL. For all practical purposes, the effect on the licensee is identical -- in both cases, the licensee will likely find itself facing a forfeiture that is much higher than the base forfeiture

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<sup>4/</sup> See Pleasant Broadcasting Co. v. FCC, 564 F.2d 496, 500 (D.C. Cir. 1977) ("[S]ection 504(c) prevents the existence of a notice of liability or an order of forfeiture from being used against a broadcast licensee in other Commission proceedings, unless the forfeiture has been paid or a court order requiring payment has become final") (citation to legislative history omitted); WIYN Radio, Inc., 59 F.C.C. 2d 424, 425 (1976) (denying a motion for stay of forfeiture proceedings, on grounds that the licensee has the right not to pay the forfeiture until ordered to do so by a United States District Court and, in the interim, Section 504(c) protects it by prohibiting the Commission from using the fact of issuance of the forfeiture notice against the licensee).

amount due solely to allegedly inappropriate conduct in another, non-final forfeiture proceeding. This is precisely the prejudice that Congress sought to avoid in adopting Section 504(c).

Moreover, the Commission's statement that "the licensee is not being hurt in any way for its failure to pay the NAL" (id. at 36 (emphasis added)) completely ignores the business realities of the broadcast industry. By treating an individual broadcaster as a repeat offender, and suggesting that the broadcaster has engaged in "egregious" misconduct, solely on the basis of unadjudicated allegations, the Commission visits substantial damage to that broadcaster's reputation both in the inevitable press coverage and within the broadcast community as a whole. Such adverse consequences can neither be ignored nor wished away.

The Commission's reliance on an isolated excerpt from the legislative history of the Communications Act is equally unavailing. Id. at ¶ 33. Indeed, the final Senate Report upon which the Commission relies states that the facts underlying a pending NAL may be used only where full procedural rights (e.g., cross examination) are afforded to the licensee (S. Rep. No. 1857 at 11: "The licensee could not, therefore, complain of the introduction of such evidence so long as he has the right to cross examine the witnesses introducing it and the further right to offer evidence to rebut it") (emphasis added). Even assuming arguendo that this Senate Report language could be read to modify the plain language of the statute, the language is inapposite in the situation addressed herein — because licensees are not afforded any cross examination or any similar procedural rights in the NAL context, the facts or conduct underlying a mere forfeiture notice may not be used as the basis for an upward adjustment in a subsequent forfeiture proceeding.

Moreover, that legislative history, taken as a whole, conclusively demonstrates the impropriety of the Commission's interpretation of Section 504(c). The relevant portions of the legislative history are set forth in detail in Infinity's comments on the Commission's NPRM,<sup>5/</sup> and are incorporated by reference herein, but it is especially noteworthy that Senate Commerce Committee Chairman John O. Pastore, architect of the legislation, remarked:

[In] regard to the forfeiture provisions, we felt we should include language which would guarantee due process. So . . . the licensee must be notified of the time when the violation was committed, and also must be notified of the nature of the violation; and after the fine is imposed, he has a right to go to the courts and begin the case de novo, on the merits.

106 Cong. Rec. 17622 (Aug. 25, 1960) (emphasis added).

With respect to Section 504(c) in particular, Senator Pastore inserted the following printed statement into the Congressional Record:

Also, in order to safeguard further the rights of the licensee, the bill as reported by this committee would further amend Section 504 . . . by adding thereto a new subsection designated as subsection (c).

Such new subsection would provide that the pendency of a forfeiture action, prior to final adjudication thereof, as provided in the proposed amendment to Section 504(a) [regarding trial de novo in a federal district court], shall be without prejudice to the licensee in any other proceeding before the Commission.

106 Cong. Rec. 17623 (Aug. 25, 1960) (emphasis added); S. Rep. No. 1857, 86th Cong., 2d Sess. at 10-11 (1960) (containing identical language).

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<sup>5/</sup> Infinity Comments at 4-8.

In response to the concern expressed by the American Bar Association that a licensee who in good conscience has refused to pay a particular forfeiture would face adverse consequences in subsequent Commission proceedings, Senator Pastore remarked that: "Now, I don't care how they do this, at what juncture they impose this fine so long as the licensee doesn't have to pay it until he has had his day in court and that he won't be penalized for not having paid it. I mean, I brought that matter up." Hearing on S. 1898 Before the Communications Subcommittee of the Senate Commerce Committee at 98 (emphasis added). Indeed, toward the close of the hearing, the Senator requested Mr. Rea, an ABA representative who was present, the Commission's general counsel, and the NAB government affairs representative to meet with committee counsel to "draft something" to take care of this problem. Id. at 101-02.

In response, the ABA leaders suggested language that would prohibit any reliance on the issuance of a forfeiture or the pendency of a civil suit to enforce a forfeiture order, which they believed to be:

indispensable if the Commission is to be empowered to issue orders of forfeiture without full hearing. We believe that under fundamental principles of due process licensees cannot be treated as guilty of violations of law by virtue of ex parte orders. The departure from due process would be particularly aggravated here since it would not be within the power of the licensee to seek to vindicate himself by instituting judicial proceedings and thereby securing a full hearing; i.e., a trial de novo. He would have to await suit against him to enforce the order, which might well be long delayed or, indeed, never brought.

Id. at 113 (reprinting letter of Bryce Rea, Jr. to Hon. John O. Pastore (Aug. 11, 1960)).

Even without this compelling legislative history, however, it is a basic tenet of statutory interpretation that the plain language of the underlying statute is controlling. In this

instance, that language is abundantly clear -- the Commission may not, under any circumstances, use the existence of an unadjudicated forfeiture decision “in any other proceeding before the Commission[] to the prejudice of the person to whom such notice was issued . . . .” 47 U.S.C. § 504(c). The Commission cannot in this proceeding accomplish that which the statute expressly prohibits.

A recent decision of the Court of Appeals for the District of Columbia Circuit indicates that the Commission’s current interpretation of its authority under Section 504(c) is constitutionally suspect -- under the First Amendment. In Action for Children’s Television v. FCC, 59 F.3d 1249 (D.C. Cir. 1995) (“ACT IV”), a divided panel narrowly upheld the procedures for enforcement of the Commission’s indecency standards. In that decision, however, the majority opinion noted that:

[T]he broadcaster’s claim [that the Commission’s procedures for enforcement of its indecency standard lack appropriate safeguards and infringe their First Amendment rights] might be more compelling if in a particular case the Commission increased the fine for a subsequent violation or decided not to renew a license when the broadcaster had neither acquiesced in the former determination of indecency nor yet had its day in court. Such a situation creates a greater risk that material that is not indecent is being kept off the air.

ACT IV, 59 F.3d at 1262 (emphasis added).

Although the Court indicated that such reliance on unadjudicated forfeitures may violate broadcasters’ First Amendment rights, the Commission nevertheless now intends to make this constitutionally suspect procedure applicable in every case as a matter of policy. Given the ACT IV Court’s concerns, the Commission should revise its Forfeiture Policy Statement to make

clear that neither prior unadjudicated violations nor the conduct underlying them will be considered in determining upward adjustments for “repeated or continuous” violations.

**II. Several Factors Serve To Exacerbate The Prejudicial Effect Of The Commission’s Interpretation Of Section 504(c).**

**A. Broadcasters Are Prejudiced By Inadequate Procedural Safeguards In The Enforcement Of The Commission’s Indecency Standards.**

In the Report and Order, the Commission attempts to justify its interpretation of its authority under Section 504(c) by claiming that licensees will suffer no prejudice because they will not be required to pay a forfeiture “without having an opportunity to present evidence before the Commission or in court that it did not commit the earlier violations.” Report and Order at ¶ 36. The procedures afforded to licensees who challenge the Commission’s indecency rulings, however, are wholly inadequate, subject to unreasonable delays, and do not provide the necessary due process protections guaranteed by the Constitution.

Under the prevailing scheme for enforcement of its broadcast indecency standard, the Commission generally issues an NAL anywhere from six months to three years after the relevant material was broadcast. Prior to the issuance of the NAL, the licensee may well be unaware that the Commission is contemplating assessing a forfeiture for broadcasting allegedly indecent material. Once the NAL has been issued, and the time period for the licensee’s response has elapsed, the Commission generally imposes the forfeiture. The Commission, however, takes months, and sometimes years, to act on a pending forfeiture. For example, according to the ACT IV court, “[i]n the seven instances in which the Commission imposed a forfeiture between

January 1987 and March 1993, it took from two to 23 months -- and an average of approximately nine months -- for the FCC to make its decision.” ACT IV, 59 F.3d at 1254 (emphasis added).

Once the forfeiture decision becomes final, the matter ultimately may be referred to the Department of Justice for collection in a civil action, where the licensee is entitled to a trial *de novo* on the issue of whether the material broadcast was, in fact, indecent. 47 U.S.C. § 504(a).

Although judicial review of the Commission’s indecency decisions may therefore ultimately occur, in fact, administrative delays at both the Commission and the Department of Justice effectively preclude prompt judicial action: “In an extreme case, therefore, a broadcaster could wait as long as six or seven years from the time a program was aired until its first opportunity for judicial review of the Commission’s decision that the material was indecent. By all indications, a long wait promises to be the rule rather than the exception.” Id. (emphasis added). Indeed, CBS Radio is aware of no indecency forfeiture that has been prosecuted by the Justice Department to final conclusion.

In light of the substantial delays that licensees face in securing administrative and judicial review of Commission indecency forfeiture decisions, the Commission’s contention that the use of the underlying facts of an unadjudicated NAL in subsequent Commission proceedings does not prejudice the licensee rings particularly hollow. Indeed, Circuit Judge Tatel, who dissented from the majority opinion in ACT IV and would have remanded the case to the District Court to establish constitutionally sound procedures for the prompt review of Commission indecency forfeiture decisions, took up a theme articulated in the majority opinion and criticized the Commission on this very ground:

Not only is judicial review unavailable, but the Commission relies on its unreviewed indecency determinations to impose increased penalties on broadcasters that air material the FCC has previously declared indecent. In several instances, the Commission has doubled and tripled forfeitures, explaining that past violations ‘establish a pattern of apparent misconduct warranting the fine we set today,’ ... that ‘the violation was repeated, and ... your past compliance history includes similar apparent misconduct,’ ... and that the broadcast was ‘egregious,’ given the Commission’s prior determinations that the same material was indecent ...’

ACT IV, 59 F.3d at 1265 (Tatel, J., dissenting).

**B.     The Generic Indecency Standard Is Impermissibly Vague And Provides No Guidance For Broadcasters As To What Material Is Considered Indecent.**

The Commission defines “broadcast indecency” as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”

Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 FCC Rcd 704, 705 n.10 (1993). The Commission itself has implicitly acknowledged the vagueness inherent in the indecency definition by committing itself in a February 2, 1994 Settlement Agreement with Evergreen Media Corp. “to publish industry guidance relating to its case law interpreting 18 U.S.C. § 1464 and the FCC’s enforcement policy with respect to broadcast indecency . . . .”

Notwithstanding this pledge, the Commission has failed to issue these industry guidelines.

Indeed, recent comments by Commissioner Quello in the trade press strongly indicate that such guidelines will never be released. In response to a question whether new indecency guidelines will

be forthcoming, Commissioner Quello responded, "No, I don't think so." When asked at what point a broadcaster will know that certain material is indecent, Commissioner Quello stated, "it almost gets to be a judgment call that will probably stand up in court." See Radio and Records, July 25, 1997 at 14.

In addition, a recent Supreme Court decision has raised new questions about the constitutionality of the Commission's definition of broadcast indecency. In Reno v. American Civil Liberties Union, No. 96-511, 1997 U.S. LEXIS 4037 (June 26, 1997), the Supreme Court struck down Congress' attempt to regulate indecency on the Internet. The Court found that the indecency standard set forth in Sections 223(a) and (d) of the Communications Decency Act of 1996 ("CDA") were unconstitutionally overbroad. It is important to note that for all practical purposes, the language of Section 223(d) is identical to the definition of "broadcast indecency" utilized by the Commission.<sup>6/</sup> In reaching this conclusion, the Court emphasized that the vagueness of the CDA standard was of particular concern. Reno v. ACLU, 1997 U.S. LEXIS 4037, at \*49.<sup>7/</sup>

In light of the inherent vagueness of the Commission's indecency standard, the agency's failure to clarify that standard, and the significant issues concerning its constitutionality, broadcasters are and will be unable to gauge with any degree of confidence whether material they

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<sup>6/</sup> The only difference in the two standards is that the Commission's definition includes the phrase "for the broadcast medium" after the words "measured by contemporary community standards."

<sup>7/</sup> For a more complete exposition of the ramifications of Reno v. ACLU for the Commission's enforcement of the indecency definition, see the August 22, 1997 Response of Sagittarius Broadcasting Corporation to a Notice of Apparent Liability concerning excerpts from the Howard Stern Show, at 9-13.

broadcast is indeed indecent. The chilling effect on freedom of speech that this uncertainty engenders in turn exacerbates the prejudice to which broadcasters will be subjected if the Commission's interpretation of Section 504(c) is permitted to stand.

**C. Individual Commissioners Appear To Have Prejudged The Merits Of Certain Challenges To Indecency Rulings And Threaten To Punish Broadcasters That Fail To Acquiesce.**

The ability of a licensee to secure equitable treatment at the Commission is further undermined by the rhetoric surrounding its indecency decisions. Commissioners have been known to both criticize a licensee's broadcast of allegedly indecent material and threaten dire consequences, such as a denial of a renewal of license, if such allegedly improper conduct continues:

The Commission's treatment of Infinity Broadcasting Corporation demonstrates the leverage the agency has over broadcasters, as well as its use of unreviewed indecency determinations to impose stiff monetary penalties. The Commission notified Infinity and one of its subsidiaries that it intended to levy a \$200,000 forfeiture on each of three stations that broadcast the same allegedly indecent program. It based this unusually large fine on "the apparent pattern of indecent broadcasting exhibited by Infinity over a substantial period since our initial indecency warning." The Commission warned that any future failures to comply with its indecency regulations would produce additional sanctions, including possible revocation of Infinity's broadcast licenses. Commissioner Quello made this threat explicit: "We could, for example, say 'enough is enough' and set all, or some, of Infinity's licenses for hearing to determine whether Infinity possesses the character to continue to hold them or whether they should be revoked. At this time -- and I underline, *at this time* -- I am not persuaded to take this step."

ACT IV, 59 F.3d at 1266 (Tatel, J. dissenting)

More recently, Commissioner Quello was quoted in the trade press as having made the following response to a statement that Infinity could successfully challenge the assessment of forfeitures against it for material broadcast on the Stern Show: “Yeah, you can beat it, but I’ll tell you what it’s going to do to you. If you beat it, its going to be three or four years in court and nothing’s going to be approved out of this place.” See Radio and Records, July 25, 1997 at 14 (emphasis added).


As the foregoing makes clear, not only do individual commissioners appear to have prejudged the merits of any challenge to the Commission’s indecency rulings, but threats of denial of applications in pending, unrelated Commission proceedings, in violation of the statutory requirements of Section 504(c), have been made. The Commission’s conclusion that its interpretation of Section 504(c) “does not cause the prejudice that Congress sought to avoid in Section 504(c)” is therefore unwarranted and should be reversed. Report and Order at ¶ 36.

**Conclusion**

For the foregoing reasons, CBS Radio respectfully requests the Commission to reconsider its Report and Order and declare that neither the facts underlying prior unadjudicated forfeiture decisions nor the decisions themselves will be used as the basis for upward adjustments for "repeated or continuous" violations.

Respectfully submitted,

**CBS RADIO**

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